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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Docket No. 72-604

STATE OF NEW JERSEY and HOWARD YEAGER, The Principal Keeper of the State Prison at Trenton, New Jersey,

Petitioners,

vs.

UNITED STATES OF AMERICA *ex rel.*, JOHN WILLIAM SMITH,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

Questions Presented

1. A. Whether this case is limited to a narrow factual situation, and lacks broad significance?

   B. Whether the decision of the United States Court of Appeals for the Third Circuit conflicts with the decisions of other jurisdictions?

C. Whether the Third Circuit correctly found that there was a prima facie case of discrimination?

2. Whether the unconstitutional exclusion of Black persons from the grand jury selection process is harmless error?

Statement of the Case

On July 12, 1967, respondent was arrested and savagely beaten by two Newark police officers. Respondent was indicted for assault and battery upon the two officers. The jury convicted him on one indictment, but was unable to reach a verdict on the other. Prior to trial, respondent moved to dismiss the indictment on the grounds that Black persons had been excluded from the grand jury selection process, thereby denying him equal protection of the law.

Prior to 1962 the Essex County Jury Commissioners selected names for the grand jury venire from the county voters' lists (9a).* The commissioners conceded that at that time the voters' lists were not producing a sufficient number of Black persons for jury service (MT I 382-384).**

Consequently, in 1962 the Assignment Judge of Essex County ordered the commissioners to obtain more Blacks and laborers on the grand jury (9a; 34a, n. 12). Sometime after this order the commissioners switched procedures to their version of the "key man" system.

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* The citation is to the appendix to the petition for writ of certiorari.

** The citations MT I-MT IV refer to the four blue volumes of pre-trial proceedings in the state court.

Under this new system the jury commissioners obtained the great bulk of the names of prospective jurors from their own sources (MT II 470). These prospective jurors were then sent jury questionnaires, and weeded out for various statutory disabilities (12a, n. 14). The commissioners also drew unused names from prior grand jury lists. This could amount to fifty names, or one sixth of a grand jury list (MT II 476, 4-18; 474, 5-18, 2a; n. 14). If these sources failed to yield the three hundred names required for a grand jury venire, the commissioners sometimes supplemented names from the voters' lists from the Newark area.*

In response to the order of the Assignment Court to obtain more Blacks on the grand jury, the commissioners contacted only approximately seven Black persons and organizations in the community, and obtained only approximately 250 names (MT I 380-382, 400, 402; 10a). The record indicates that only "*some*" of these names responded to jury questionnaires (MT I 399, 18-20). The commissioners did not check to see how many of these names qualified for jury service, and there is no showing that any actually qualified (MT I 399, 400).

Despite the 1962 order of the Assignment Judge, the commissioners discontinued the use of Black key men after 1964, and made no special effort to obtain Blacks for grand jury service after that time (MT I 402; 10a). They made no special effort to obtain Blacks for the May, 1967, grand jury list which indicted respondent (MT I 383).

---

*The Third Circuit correctly noted that this supplementation generally amounted to between five and twenty names, (MT II 489) so that almost all the grand jury names were submitted by the jury commissioners or were drawn from prior grand jury lists whose members had not served (12a, n. 14).

By 1966-1967, the commissioners had exhausted the names of prospective Black jurors that had been solicited in the special effort in 1962-1963 (MT I 383, 10a-11a).

The commissioners were abysmally ignorant of the composition of the Essex County community. One commissioner testified that he had not estimated the Black population of Essex County, and that he had no idea of the number of people living in Newark (the city with the largest Black population in the county) in relation to the number of people living in Essex County (MT I 366, 11a).*

Moreover the commissioners never analyzed a grand jury master list to determine whether it represented a

---

*Q. Now, Mr. Howie, do you have any idea of the number of people who are living in Newark in relation to the number of people in Essex County? A. I do not.

Q. Have you estimated the Negro population of Essex County? A. I have not. (MT I 366)

* * *

Q. Or of any of the cities in Essex County? A. No.

Q. So, it is fair to say that you have not looked into these questions? A. That's right. (MT I 373)

* * *

Q. Have you examined any occupational statistics relevant to Essex County and to Newark? A. I have not.

Q. Has anyone on your staff done that, to your knowledge? A. I don't know.

* * *

Q. Mr. Howie, have you given instructions to your staff to inquire into any of these questions that I have asked? A. I have not.

Q. Do you know whether Mr. Murray, (the other Jury Commissioner) has? A. I wouldn't know. (MT I 374)

cross-section of the community with respect to race (11a).*

In 1967 the percentage of Essex County residents of jury age that was Black was 25% (14a, n. 17).**

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*Q. Did you determine whether or not that list yielded a cross-section of the Essex County population with respect to occupation, with respect to race, with respect to residence and with respect to sex? Did you do that? A. No, I didn't.

Q. Have you done that with any Grand Jury Master Lists? A. No.

Q. Did you do that with respect to the petit jury master lists? A. No.

Q. And you have never done that? A. No. (MT I 397)

* * *

Q. Now, Mr. Commissioner, have you instructed anyone on your staff to make such an analysis of the Grand Jury Master List?

* * *

A. No.

Q. Have you instructed anyone on your staff to make such an analysis of the petit jury master list from May, 1966 to May, 1967? (MT I 398) A. No.

** The state seeks to obliterate the truth by insisting that the correct figure is 17%. This is the 1960 census figure.

At the habeas corpus hearing of this case on January 15, 1971, the Federal District Court inquired about the 1970 census figures, which were then unavailable. (Record January 15, 1971, p. 20) Counsel furnished the census to the trial Court. The 1970 census revealed that Blacks comprised 30% of the Essex County population. (14a, n. 17).

There is substantial uncontradicted evidence in the record, *even apart from the 1970 census,* that proved that Blacks comprised 25% of the population in 1967. Thus, the Third Circuit noted that the

(Footnote continued on following page)

The percentage of Black persons on the 1966-1967 grand jury lists was 6%. Blacks were thus under-represented on the grand jury lists by 75% (14a-15a, n. 18). Expert statistical testimony revealed that the statistical probability of observing 6% or less Blacks on an Essex County grand jury list in 1967 is less than one in a million (.000001) (MT IV 1137-1138; 13a, n. 16).

Subsequent to this litigation, the New Jersey Supreme Court abolished the "key man" system for the selection of grand juries in New Jersey (9a, n. 11).

There had never been a Black jury commissioner, or a Black person on the commissioners' staff for at least nineteen years prior to this litigation.*

(Footnote continued from preceding page)

New Jersey Department of Conservation and Economic Development estimated that in 1966, 27.3% of Essex County was Negro (14a, n. 17). A statistician testified that from his analysis of the available figures, that the percentage of the Essex County population between the ages of 21-74 that was Black in 1966 was 25% (MT III 1013, 22-1014, 8; MT II 1010, 8-10).

The New Jersey Department of Conservation and Economic Development also estimated that the Black population of Newark in 1966 was 52.3% (Exhibit D-31). Statistics introduced by the state corroborated this, showing that in 1967, Blacks comprised 52% of Newark's population, as compared to 34% in 1960 (Exhibit S-1, Summary of Findings).

The 1970 census thus corroborated the figures already established in the record.

* Although the Third Circuit did not reach the issue of exclusion of Blacks from the petit jury, it did hold that the petit jury selection process was "potentially suspect." (12a, n. 15) Black persons comprised only 8.36% of the 1966-1967 petit jury master lists. Only three (3) of the fifty-six (56) (5.5%) petit jurors summoned on the voir dire of respondent's trial were Black. Respondent was convicted by an all white jury of fourteen in the heart of Newark, New Jersey.

REASONS FOR DENYING THE WRIT

POINT I

This Court should deny certiorari: A) because this case is limited to a narrow factual situation and therefore lacks broad significance; B) because the decision of the Third Circuit does not legally conflict with the decisions of other jurisdictions; C) because the Third Circuit decision is factually correct.

A. The decision to which petitioner seeks certiorari is limited to a narrow factual situation. It therefore is of no broad legal or factual significance.

Whether there has been racial discrimination in the selection of jurors is a question "to be determined from the facts in each particular case". *Patton* v. *Mississippi*, 332 U.S. 463, 466.* The instant case turns on the unique facts of discrimination that existed in Essex County prior to 1968. In addition, subsequent to the events in this litigation, New Jersey abolished the "key man" system of jury selection (9a, n. 11).** Therefore the validity of state procedures is not in issue.

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* This court has taken many jury discrimination cases, but virtually all of these have served to correct the results of jury discrimination in the south. Those cases have had the broad purpose of seeking to change the widespread discriminatory practices that have been prevalent throughout the south. Here, however, the Third Circuit has already corrected the discrimination, and vindicated constitutional rights. The need that prompted the court to enter other jury discrimination cases, is not present here.

** The federal judicial system has also abolished the "key man" system as a method of selecting federal grand and petit juries (10a, n. 12).

It is clear therefore, that a reversal by this Court would have no implications beyond the bounds of this case. No important issues are at stake. Indeed the state has not argued that this case has broad application. All the state seeks to gain is the right to avoid the reindictment and retrial of one man. Such a purpose does not merit certiorari.

B. The decision to which the state seeks certiorari is not in conflict with decisions of the Supreme Court or of other jurisdictions. The petition therefore does not meet the tests for certiorari set forth in Supreme Court Rule 19.

The state's petition is basically a cut and paste verbatim repetition of parts of its brief in the Third Circuit.* It responds to the defendant's brief in the Third Circuit, but it does not respond to the *opinion* of the Third Circuit. The State does not directly confront or attack the Third Circuit's reasoning, nor does the State confront or attack the factual findings on which the court relies. Most importantly, the State does *not* argue that the Third Circuit opinion materially conflicts with opinions of the Supreme Court or of any other jurisdiction. Indeed, the legal principles applied in the opinion are in harmony with other cases in the jury discrimination area.

1. In its analysis, the Third Circuit followed the traditional prima facie and burden of proof rules in the jury area (20a, 21a-22a, 15a-16a, 13a). Thus when an accused shows a prima facie case of discrimination in the selec-

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* For example the petition headings, Point I, and Point IB, refer to the grand and *petit* juries, when the Third Circuit did not reach the issue of the petit juries.

tion of jurors, the burden shifts to the state to rebut the presumption of discrimination. The state must offer constitutionally acceptable reasons for the disparity between the percentage of Blacks in the population, and the percentage on the jury rolls. *Alexander* v. *Louisiana*, —— U.S. ——, 92 S. Ct. 1221, 1226; *Norris* v. *Alabama*, 294 U.S. 587, 591; *Patton* v. *Mississippi*, 332 U.S. 463, 466, 468; *Whitus* v. *Georgia*, 385 U.S. 545, 552; *Coleman* v. *Alabama*, 389 U.S. 22, 23; *Turner* v. *Fouche*, 396 U.S. 346, 361; *Pierre* v. *Louisiana*, 306 U.S. 354, 361. If the state fails to rebut the prima facie case, the conviction must be reversed.

2. In determining the requirements of a prima facie case, the Third Circuit held that the substantial statistical underrepresentation of Blacks on the jury rolls, standing alone, did not constitute a prima facie case of discrimination (15a-16a). Following recent Supreme Court decisions, the court held that in addition to underrepresentation, there must be an "opportunity for racial discrimination." (15a-16a).* Accord: *Alexander* v. *Louisiana*, *supra* at 1226; *Whitus* v. *Georgia*, *supra* at 552.

3. The Supreme Court has held that a jury commissioner's failure to take affirmative steps to familiarize

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* The petition for writ of certiorari states: "Defendant's argument below that disproportion, without more, is sufficient to render a jury selection system unconstitutional, is wholly without merit." (P. p. 12). This point is irrelevant, since as noted above, the Third Circuit did not take that position.

In Point IB of its petition the State argues at length that grand and petit juries need not reflect proportional representation of the various identifiable groups in the community (P. pp. 9-12). This point is also irrelevant, since the Third Circuit agrees with that principle (5a).

himself with the community, and with the eligible Blacks in a community is, standing alone, grounds for reversal. *Cassel* v. *Texas,* 339 U.S. 282; *Hill* v. *Texas,* 316 U.S. 400. See also *Smith* v. *Texas,* 311 U.S. 128, 131-132. See also *Brooks* v. *Beto,* 366 F. 2d 1, 23-24 (5th Cir. 1966). The Third Circuit did not go that far, but instead held that the commissioners' lack of knowledge of the community, "exacerbated the problems with the key man system" (11a). This approach was used in *Turner* v. *Fouche, supra* at 360, 361. See also *Davis* v. *Davis,* 361 F. 2d 770, 775 (5th Cir. 1966); *Witcher* v. *Peyton,* 405 F. 2d 725, 727 (4th Cir. 1969).

4. Although the facts in this case demonstrate intentional exclusion, the Third Circuit correctly noted that there need be no showing of an evil motive, or of a deliberate intent to discriminate, to establish a prima facie case (19a). Thus the Supreme Court has consistently held that "affirmations of good faith" by jury commissioners are insufficient to dispel a prima facie case of discrimination. See *Alexander* v. *Louisiana, supra* at 1226, and cases cited therein. The fifth and ninth circuits are in accord: *Carmical* v. *Craven,* 457 F. 2d 582 (9th Cir. 1971), cert. denied 41 U.S. L.W. 3208, Docket No. 71-1602 (1972); *United States ex rel. Seals* v. *Wiman,* 304 F. 2d 53, 65 (5th Cir. 1962), cert. denied 372 U.S. 924 (1963); *Salary* v. *Wilson,* 415 F. 2d 467, 472 (5th Cir. 1969); *Vanleeward* v. *Rutledge,* 369 F. 2d 584, 586-87 (5th Cir. 1966). The State of New Jersey agrees with this position (P. p. 18).

Thus the legal analysis in this case is in harmony with that of other jurisdictions. The Third Circuit opinion is also correct in its factual analysis.

C. The Third Circuit correctly found that there was a prima facie case of discrimination in this case.

The state does not attack or confront the facts upon which the Third Circuit relies to find discrimination.

It is undisputed that in 1962 the Assignment Judge of Essex County ordered the jury commissioners to obtain more Blacks on the grand jury (9a).* In response to this order, the commissioners contacted only approximately seven Black leaders and churches, and obtained only approximately 250 names (MT I 380, 382, 399, 400; MT II 402). This is a pitiful effort in a county containing such a large Black population (15a). The commissioners did not follow up to see if any of these names qualified for jury service (MT I 399, 18-20, 400).

It is undisputed that the commissioners discontinued the use of Black key men and made *no* special effort to obtain Blacks after 1964, and that no effort was made to obtain Blacks for the grand jury that indicted respondent (MT I 402, 383; 10a).** It is also undisputed that the commissioners were abysmally ignorant of the composition of the Essex County community, and that they never exam-

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* The commissioner admitted that in 1962 the voter lists were not producing sufficient Blacks for grand jury service (MT I 383-384).

** The state contends that jurors were solicited from the NAACP, and that special efforts were made to obtain Negroes (P. p. 4, n. 4). These efforts occurred prior to 1964 (MT I 402).

The state also asserts, without citation to the record, that questionnaires were sent to civic organizations whose memberships included substantial numbers of members of the excluded groups (P. p. 22). Aside from the negligible pre-1964 effort, there is no basis in the record for this with respect to black persons. And there is no basis in the record that any of the groups solicited prior to 1964 contained large numbers of Black persons.

ined a grand jury list to determine if it represented a cross-section of the community with regards to race. (See p. 4 of this brief.)

These facts demonstrate not merely a speculative "opportunity to discriminate", but the existence of discrimination itself. The failure of the commissioners to seek Black jurors after 1964 represents a conscious decision to continue the underrepresentation of Black persons. At the very least, these facts demonstrate that an "opportunity" to discriminate existed.

First, in abolishing the "key man" system, the New Jersay Supreme Court recognized that "the exercise of discretion by jury commissioners entails some dangers", and contains "inevitable discretionary incidents". *State* v. *Rochester,* 54 N. J. 85, 91-92, 90 (1969).

Second, the commissioners' extraordinary lack of knowledge of the composition of the community, and of their jury lists surely played a large role in the opportunity to discriminate. *Turner* v. *Fouche, supra* at 360; *Davis* v. *Davis, supra,* at 775. The commissioners, who personally obtained and submitted the bulk of the names for the grand jury lists, were ignorant of the facts that would have enabled them to satisfy constitutional standards. In addition, one surely knows that names submitted from certain cities, churches, clubs, businesses, etc., where there are no Black persons, will be white.

After the 1962 order of the Assignment Court, the commissioners solicited names from Black key men and Black organizations. These actions,

> . . . indicate that they (the commissioners) obviously knew that Negro key men and Negro organizations were the source of most Negro names. Their failure to continue to pursue such sources after 1964

> amounts to an elimination of the only significant source of Negro grand jurors in Essex County (19a-20a).*

See *Brooks* v. *Beto, supra* at 23-24.

The commissioners knew that their actions resulted in the severe underrepresentation of Black persons. They had been warned by the Assignment Judge. They realized that the 250 names obtained in the special effort were exhausted by 1966-1967 (10a-11a, MT I 383). They had instructed their clerk that when the grand jury list was less than the required 300, that he should add from the petit jury lists names of persons from Newark, the city with the largest Black population in the County (see pp. 2-3 *supra,* and footnote at p. 3; 12a.) This supplementation raises the strong inference that the commissioners knew Blacks were underrepresented (12a). The inaction by the commissioners is further exacerbated by the fact that the Black population increased steadily in Essex County after the Assignment Court's order (14a, n. 17; see also Exhibit S-1, Summary of Findings).

It is clear that the commissioners violated their duty

> . . . not to pursue a course of conduct in the administration of their office which would operate to discriminate in the selection of jurors on racial grounds. *Hill* v. *Texas,* 316 U.S. 400, 404.**

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* The discontinuance of Black key men is exacerbated by the fact that there had never been a Black jury commissioner, or a Black person on the commissioners' staff. (See p. 6 of this brief)

** The federal trial court basically agreed. Citing *Swain* v. *Alabama,* 380 U.S. 202, it described the grand jury selection procedure as "somewhat haphazard," and stated that "little effort was made to ensure that all groups in the community were fully represented." (36a)

The results of this process were readily predictable. Blacks comprised 25% of the community, but only 6% of the grand jury rolls. Thus seventy-five percent of the eligible Black population was excluded from jury service (14a-15a; see *Rabinowitz* v. *United States*, 366 F. 2d 34, 56, n. 55 (5th Cir. 1966).

This disparity is comparable to other disparities invalidated by this court. In *Whitus* v. *Georgia*, *supra*, this court invalidated a smaller disparity (21.7% Blacks on tax digests; 9.1% Blacks on grand jury venire, a disparity of 18% as compared with 19% in the instant case) stating that such a disparity "strongly points" to the conclusion of discrimination. *Whitus* v. *Georgia*, *supra* at 552. See also *Alexander* v. *Louisiana*, *supra* (Blacks in community, 21%, Blacks on grand jury venire, 6.75%); *Jones* v. *Georgia*, 389 U.S. 24 (Blacks on tax digests, 19%; Blacks on jury lists, 5%); *Sims* v. *Georgia*, 389 U.S. 404 (Blacks on tax lists 24.4%; Blacks on jury lists, 9.8%). See also *Labat* v. *Bennet*, 365 F. 2d 698 (5th Cir. 1966) (Blacks in community, 25.8%; on jury rolls 6%).

Expert statistical testimony revealed that the probability of observing 6% or less Blacks on grand jury venires in Essex County was less than 1 in 1,000,000. The Third Circuit noted that while these statistics alone did not establish a prima facie case of discrimination, they were useful in pointing up the kind of underrepresentation necessary for a prima facie case (13a; 13a, n. 16; 15a, n. 18). Accord: *Alexander* v. *Louisiana*, *supra* at 1225, n. 9. *Whitus* v. *Georgia*, *supra*, at 552 n. 2 (1967).*

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* Petitioner argues that respondent's statistician did not take into account the various statutory disqualifications and exemptions which might have reduced the percentage of qualified Black persons (P. p.

(Footnote continued on following page)

Since the Third Circuit opinion is factually and legally correct, certiorari should be denied.

POINT II

The exclusion of Blacks from the grand jury denied respondent equal protection of the law guaranteed by the Fourteenth Amendment. This is not harmless error.

In Point III of its petition the state argues that the "harmless error" rule should be applied to grand jury discrimination cases. In five years of litigation, the state has never raised this issue, and this court should therefore not consider it.

There is not a single case in the jury exclusion area which has adopted the harmless error rule set forth. It has virtually never been considered an issue.

> For over 90 years, it has been established that a criminal conviction of a Negro cannot stand under the Equal Protection Clause of the Fourteenth Amendment if it is based on an indictment of a grand jury from which Negroes were excluded by

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(Footnote continued from preceding page)

5-7). This statement is untrue, since all of respondent's statistics were based on the age qualification 21-74. However, the Third Circuit correctly noted that the class of Black persons is *presumed* qualified for jury service, and that once a prima facie case is established, the burden is on the state to rebut that presumption (20a-21a). For other authority supporting this position which the Third Circuit did not cite see *Coleman* v. *Alabama*, 389 U.S. 22, 23. *Turner* v. *Fouche*, *supra* at 359, 361-362; *Whitus* v. *Georgia*, *supra* at 551-552.

> reason of their race. *Alexander* v. *Louisiana*, *supra* at 1224.

This Court has consistently reversed convictions solely on the grounds that Blacks were excluded from the grand jury. See particularly *Pierre* v. *Louisiana*, 306 U. S. 354, where Justice Black stated:

> Principles which forbid discrimination in the selection of Petit Juries also govern the selection of Grand Juries. "It is a right to which every colored man is entitled, that, in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them because of their color." *Pierre* v. *Louisiana*, *supra* at 362.

See also *Smith* v. *Texas*, 311 U. S. 128; *Eubanks* v. *Louisiana*, 356 U. S. 584; *Hill* v. *Texas*, 316 U. S. 400; *Akins* v. *Texas*, 325 U. S. 398. In 1970 this court reaffirmed that,

> [o]nce the State chooses to provide grand and petit juries, *whether or not constitutionally required to do so*, [footnote omitted] it must hew to federal constitutional criteria in ensuring that the selection of membership is free of racial bias, [footnote omitted] . . . *Carter* v. *Jury Commission of Greene County*, 396 U. S. 320, 330.

The state's argument in Point III of its petition is basically a repetition of Justice Jackson's dissenting opinion in *Cassell* v. *Texas*, 329 U. S. 282, 288-305. The court in *Cassell* declined to accept that reasoning.

Respondent has a fundamental constitutional right to the equal protection of the laws—to be indicted and tried by a system of justice that does not discriminate against Black persons, and against him. It would be a sad day for our system of government, and a throw-back to the days of slavery, if the denial of one of our most cherished

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•One of the state's basic contentions is that when Blacks are excluded from the grand jury, the "aggrieved" party is not the defendant, but in reality the class of Blacks who have been excluded (P. p. 24, n. 17). This overlooks the defendant's right to equal protection.

The State argues that since Blacks as a class can sue under 42 U.S.C. §1983 for admission to grand juries, that their rights are protected, and that there is no further need to permit the defendant to effectively challenge the grand jury (P. p. 24-26).

However, a criminal defendant is the person most likely to challenge a grand jury array, for he has the vital stake in the outcome. Virtually all of the grand jury challenges have been raised by defendants. Class actions challenging juries are few and far between, and no such suits have been filed in Essex County. Respondent's right to equal protection would be irreparably lost were this Court to suddenly adopt petitioner's suggestion.

Criminal prosecutions against jury officials pursuant to 18 U.S.C. §243 are non-existent (P. p. 25, n. 19). In short, grand jury discrimination would go unchallenged, if defendants were denied the right to effectively challenge it.

Finally, the State claims that respondent was not prejudiced by the exclusion of his class from the grand jury (P. p. 26-27). But a showing of prejudice has never been an element of jury exclusion cases, whether grand or petit. It would be impossible to show prejudice, even in petit jury cases. One could not show, for example, that a jury without Blacks on it could not have found the facts as fairly as a jury with Blacks. The prosecution could always argue that the evidence of guilt in a given trial was so great, that any jury would have convicted. Hence, the harmless error rule could easily be extended to petit jury challenges, if the state's position were adopted.

rights—the right to equal protection—were considered harmless error.

The injury is not merely to the defendant.

> ". . . [T]here is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Rabinowitz* v. *United States*, 366 F. 2d 34, 59-60 (5th Cir. 1966) (en banc).*

Since there are no conflicting judicial decisions on this issue, and since the law has been well settled for so long, certiorari on this issue should be denied.

CONCLUSION

For the reasons submitted, respondent respectfully prays that the petition for writ of certiorari be denied.

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* These considerations far outweigh those presented by the state's *speculation* that the Third Circuit decision "may" set defendant free (P. p. 23, n. 15). If this happens, justice will be served. Respondent, who is innocent, received a severe beating, including a cracked rib, and groin injuries from the police. He has had the threat of jail hanging over his head for over five years. He cannot locate two key witnesses, who saw the beating in the patrol car. If the statute of limitations prevents reindictment, the state cannot complain. For it was the state's racial discrimination that forced this lengthy litigation.